



September 26, 2019

Via Email Only

Ms. Ashley E. Davis
Deputy General Counsel
Mr. Brad McVay
General Counsel
Florida Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250
brad.mcvay@dos.myflorida.com

Dear Ms. Davis and Mr. McVay:

We write to express our concerns regarding your process for amending Rule 1S-2.040, voter registration form DS-DE 39, the Spanish-language form DS-DE 39, and the Online Voter Registration (OVR) form.

While the rulemaking process is now under way with respect to the English-language form DS-DE 39, an amended version of this form as well as the Spanish-language and OVR forms have already been promulgated, in clear violation of the Florida Administrative Procedure Act (APA).¹ Deficiencies in the amended versions of these forms² are already having real-world

¹ F.S.A. § 120.52(8)(a) (agency action invalid where “[t]he agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter”). *See also* F.S.A. § 120.68(7) (providing for judicial injunction and remand where “[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure”).

² These include problems with both the printed and online-fillable versions of both the English- and Spanish-language forms.

impacts, causing confusion and creating additional barriers for returning citizens and Spanish-speaking citizens attempting to register to vote.

During the August 6, 2019 Rule 1S-2.040 workshop, Ms. Davis asserted that the Florida Department of State (DOS) has the authority to promulgate amended versions of these forms prior to completion of the rulemaking process, and without invoking emergency rulemaking authority and following that process.³ When asked to cite the legal authority she was referring to, Ms. Davis declined to do so,⁴ and we have been unable to find any Florida law that would permit the promulgation of these forms prior to the completion of the rulemaking process.

Promulgating amended versions of these forms constitutes a rulemaking, and is therefore governed by the procedural requirements of the APA. It is not enough that this process is now under way with respect to the English-language form—that flawed versions of these forms are already causing voter confusion illustrates why following the full rulemaking process is so important.

Even more concerning, when asked about the rulemaking process for the Spanish-language form, Ms. Davis asserted that this form is not subject to rulemaking at all.⁵ Because the Spanish-language form is “a uniform statewide voter registration application,” it must be prescribed by rule,⁶ and is therefore subject to the same requirements under the APA as the English-language form. Ms. Davis’ statement at the August 6 workshop that “I don’t know how we would go about workshopping a Spanish-language version, I certainly don’t speak Spanish well enough”⁷ illustrates both a lack of concern that these forms be translated accurately and a lack of capacity on the part of DOS to do so, making it clear that public input in developing the Spanish-language form is essential.

DOS in 2013 went through the full rulemaking process when amending these forms, and in 2016 took additional public comment on the Spanish-language form—DOS must do so again now. The OVR form is also “a uniform statewide voter application” and therefore subject to rulemaking.⁸ Each of these forms are separate and distinct, and each requires formal rulemaking.⁹

While the amended versions of these forms are deficient in important ways, and their promulgation prior to rulemaking constitutes an invalid exercise of agency authority under the APA, we recognize that rescinding them now may cause additional confusion for those

³ See Audio Recording of August 6, 2019 Rulemaking Workshops at 1:50:40-51:40, available at <https://www.dropbox.com/s/y4y9gunchunwh0mt/8.20.19%20Rulemaking.zip?dl=0>.

⁴ *Id.*

⁵ See *id.* at 1:51:44-52:50.

⁶ F.S.A. § 97.052(1) (“The department shall prescribe *by rule* a uniform statewide voter registration application for use in this state.”) (emphasis added).

⁷ See Audio Recording of August 6, 2019 Rulemaking Workshops at 1:51:44-52:50.

⁸ Deficiencies with the OVR form were detailed in our prior letters, which are attached for your reference.

⁹ This includes providing notice directed specifically at the returning citizen and Spanish-speaking communities, and providing both public workshops during development of the rule and public hearings prior to adoption of the final rule. See F.S.A. § 120.54(3)(a)3 (Notice must be “give[n]... to those particular classes of persons to whom the intended action is directed.”); see generally F.S.A. §§ 120.525, 120.54(2)(c), 120.54(3)(c), 120.54(3)(a), 120.54(3)(a)2.

attempting to register to vote using the new forms. Therefore, **we demand that you issue an emergency rulemaking in order to make it clear to all those affected that both the current, interim versions *and* the prior versions of both the English- and Spanish-language forms are currently valid, and should be accepted as such by all Supervisors of Elections pending final rulemaking on the new forms. We also demand that formal rulemaking be initiated forthwith for the new Spanish-language form and OVR form.**

Finally, we request information as to how you intend to ensure the amended rule and forms are implemented in compliance with the National Voter Registration Act and state law, and that this information be added to the rulemaking record.

We offer our assistance in ensuring that the rulemaking process is open and accessible to affected individuals, and that the final forms, when adopted, implement the changes required by Florida law while ensuring equal access to voter registration for all eligible Florida citizens.

Thank you for your consideration and prompt attention to this urgent matter.

Liza McClenaghan

State Chair

Common Cause Florida

9877 Clear Lake Circle

Naples, FL 34109-0787

Telephone: 239-777-8948

florida@commoncause.org

Cecilia Aguilera

Counsel, Fair Elections Center

1825 K Street NW, Suite 450

Washington, DC 20006

Telephone: 202-331-0114

caguilera@fairelectionscenter.org

Julie M. Houk

Managing Counsel for Election Protection

Ryan Snow

Legal Fellow

Voting Rights Project

Lawyers' Committee for Civil Rights Under Law

1500 K Street NW, Suite 900

Washington, DC 20001

Telephone: 202-662-8391

jhouk@lawyerscommittee.org

rsnow@lawyerscommittee.org

Kira Romero-Craft

Managing Attorney, Southeast Regional Office

LatinoJustice
523 West Colonial Drive
Orlando, FL 32804
Telephone: 321-250-2853
kromero@latinojustice.org

Brad Ashwell
Florida State Director
All Voting Is Local
603 N Martin Luther King Jr Blvd
Tallahassee, FL 32301
Telephone: 850-294-1008
brad@allvotingislocal.org

Patti Brigham
President
League of Women Voters of Florida
P.O. Box 1911
Orlando, FL 32802
Telephone: 407-797-2562
patricia@lwvfl.org

Chiraag Bains
Director of Legal Strategies
Dēmos
740 6th Street NW, 2nd Floor
Washington, DC 20001
Telephone: 202-864-2746
cbains@demos.org

cc:
Secretary of State Laurel Lee
laurel.lee@DOS.MyFlorida.com
Matthews, Maria I., Director, Division of Elections
Maria.Matthews@DOS.MyFlorida.com

Attachments:
July 18, 2019 Letter to Brad McVay
July 24, 2018 Letter to Liza McClenaghan, Michelle E. Kanter Cohen, and Julie M. Houk
July 26, 2018 Letter to Ashley E. Davis and Brad McVay
[Audio Recording of August 6, 2019 Rulemaking Workshops](#)